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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 SERE CONDE,

4 Plaintiff,

New York, N.Y.

5 v.

11 Civ. 4010 (RJS)

6 SISLEY COSMETICS USA, INC., et
7 al.,

8 Defendants.

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9 March 12, 2012

10 9:05 a.m.

11 Before:

12 HON. RICHARD J. SULLIVAN,

13 District Judge

14 APPEARANCES

15 THE WHITE ROSE GROUP LLC
Attorneys for Plaintiff
16 BY: JESSE C. ROSE

17 SCHNUAFER & METIS, LLP
Attorneys for Defendant
18 Sisley Cosmetics USA, Inc. and Bhagvan Dugre
BY: PETER METIS

19 THOMPSON WIGDOR & GILLY LLP
Attorneys for Defendant Saks Inc.
20 BY: LAWRENCE M. PEARSON
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(Case called; all sides ready)

THE COURT: Good morning to each of you.

This was scheduled for a post-discovery conference, but in the interim Saks has filed its motion, which was fully briefed at the end of December, and I have not resolved that motion yet. So I think I asked my law clerk to reach out to the parties to see if we should adjourn this or whether it made sense to at least use this as a status conference. And so I think the consensus was perhaps the latter.

So, tell, me what's going on with discovery at this point. Whoever?

MR. ROSE: Sure. The plaintiff has been deposed by Sisley. We deposed two of the individual defendants and one witness from Sisley and noticed another deposition of someone who doesn't work there anymore. We're in the process of getting their contact information.

The remainder of the witnesses that we would like to depose are employed by Saks. And so we are waiting until we find out if they are attending or not.

THE COURT: Would they be witnesses who would be deposed as third parties, if they weren't? Say I ruled in favor of Saks, would these be witnesses you are still going to depose?

MR. ROSE: Yes. Then it would be under different circumstances if they were a party.

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1 THE COURT: It would make that much of a difference in
2 terms of the subject matter covered?

3 MR. ROSE: Yes, it would.

4 THE COURT: OK. Once the motion is resolved, how long
5 about for discovery do you think, ballpark? It may turn in
6 part on how I rule. But from your perspective, if the motion
7 were denied, how long would it take the remainder of discovery
8 to wrap up?

9 MR. ROSE: I would say three months. We could serve
10 discover demands in a week, and then if we got them within 30
11 days, then 45 days for depositions would be plenty.

12 THE COURT: All right. How many more depositions do
13 you think would remain if Saks were still in the case?

14 MR. ROSE: I believe we have four to five.

15 THE COURT: OK. All right. And defense counsel feel
16 that is basically right?

17 MR. METIS: That is basically right. As defendant
18 Sisley, we still have some additional discovery to do, as well,
19 of Saks and maybe a nonparty witness and that is it. I think
20 that's plenty of time to finish discovery.

21 THE COURT: All right. Experts? Anybody
22 contemplating experts?

23 MR. METIS: We don't have any experts.

24 MR. PEARSON: No, your Honor. Three months sounds
25 about right.

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1 MR. ROSE: We are probably going to have an emotional
2 damages expert.

3 THE COURT: Oh, you are. All right.

4 Well, why don't we do this. Why don't we schedule the
5 Saks' motion, I think, for an oral argument. I think it will
6 probably have to be, given my trial schedule, the end of a
7 April or so. How does that work?

8 (Pause)

9 Monday, April 30th, in the afternoon; does that work?

10 MR. PEARSON: Yes, your Honor.

11 THE COURT: 2:30 p.m., Monday, April 30.

12 OK. I'm sorry this hasn't taken longer. Sometimes
13 between my trial schedule and bench trials, which really can be
14 a time sucker, this is just what happened.

15 Something you want to say, Mr. Rose?

16 MR. ROSE: Yes, your Honor. If we have that much time
17 before the oral argument, I was going to request if we could
18 submit supplemental information that would be relevant that was
19 obtained during discovery to the motion itself.

20 THE COURT: What do you have in mind?

21 MR. ROSE: Some of the testimony during deposition
22 went to Saks' involvement in Ms. Conde's employment as well as
23 her termination.

24 THE COURT: All right. I mean, this is basically a
25 motion that does turn in part on -- well, let me hear from

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1 Mr. Pearson.

2 MR. PEARSON: Certainly, your Honor.

3 Saks, as an observer, attended all of the depositions
4 that have been taken thus far including plaintiff, the
5 individual defendant Dugre, and another witness. And, really,
6 from our perspective, plaintiff has already had three
7 opportunities here -- the complaint, the amended complaint, the
8 opposition. And from what was observed at the depositions,
9 really any of the material that I could see that plaintiff
10 might want to present on the subject of a motion is essentially
11 duplicative of the allegations in the complaint and really
12 wouldn't add any further arguments. Certainly, plaintiffs
13 didn't claim that there is anything in the reply that they need
14 to respond to that was new.

15 So from our perspective, they had plenty of
16 opportunity up to this point, and even right now nothing has
17 been raised that would be new beyond what was already alleged
18 in substance if not exactly alleged in the amended complaint.

19 THE COURT: I don't know that. You may be right. But
20 if there were things that came out in discovery that bolster
21 the arguments of one side or the other, that is fair game,
22 wouldn't you think?

23 MR. PEARSON: I would, your Honor. Although the fact
24 is that the plaintiffs need to plead their allegations, and if
25 the pleadings are inadequate, then, really, the claims ought to

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1 fail. But I agree that the Court has an interest in acting on
2 full information.

3 THE COURT: Right.

4 MR. PEARSON: I just haven't heard anything that would
5 indicate that we need to engage in a further volley of briefs
6 here.

7 THE COURT: Yes. Mr. Rose, it is almost as if you are
8 suggesting that there is information that would come out in
9 discovery that would be the basis for a further amended
10 complaint that would bolster the pleading. Is that what you
11 are saying?

12 MR. ROSE: It is possible. It is information that we
13 didn't have prior to filing the complaint, information that
14 wasn't within the plaintiff's --

15 THE COURT: There is a motion to dismiss --

16 MR. ROSE: Yes, your Honor.

17 THE COURT: -- under 12(b)(6), right, Mr. Pearson?

18 MR. PEARSON: That is correct, your Honor.

19 THE COURT: There is failure to plead facts that would
20 support the causes of action. And so if there is information
21 in discovery, that's the kind of thing I guess that is great,
22 but that is not something I am going to consider in connection
23 with this motion. It would seem to me to inform a different
24 motion, which would a motion to amend the complaint to include
25 these new facts, which would presumably result in a different

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1 conclusion. That would be what you would be saying, I think.

2 MR. ROSE: Well, to the extent that our opposition
3 additionally requested that we be allowed to conduct discovery
4 in relation to this matter, because we don't have all the
5 information, as far as bolstering that argument, that discovery
6 should be permitted rather than dismissing because we don't
7 have all the information.

8 Or if your Honor would like, we could also submit
9 either an affidavit from the plaintiff or an affirmation citing
10 the documents just so you understand what it would be, and if
11 your Honor thinks we should amend the complaint further, then
12 you can let us know at that point.

13 THE COURT: Again, I think it is sort of what you want
14 to be using these new facts for. If you want these new facts
15 just to create an argument that I should allow further
16 discovery, I think that's sort of beside -- either there is
17 enough in the complaint or there is not enough in the
18 complaint. The facts alleged in the complaint are sufficient
19 or they are not sufficient.

20 If they are not sufficient, then I dismiss with or
21 without prejudice. And if there are additional facts that have
22 come to light that you want to include, then I guess this is
23 really a motion to amend.

24 I am trying to recall. I don't think you indicated
25 that -- you haven't requested also an opportunity to amend as

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1 part of your papers, have you?

2 MR. ROSE: Only if your Honor doesn't deem that the
3 claims are sufficiently pled, then we would ask to amend again.

4 THE COURT: I am thinking. You know what the new
5 facts are. If you want to be safe and say you would like to
6 amend to include these new facts because they make it sort of
7 clear beyond a reasonable doubt, then I guess I would consider
8 that. I would ask you to do a pre-motion letter, three pages,
9 laying out what the new facts are and how they alter the
10 analysis and what you would be adding to your pleading.

11 You know, that's up to me. That would be within my
12 discretion to allow that. There was an amended complaint
13 already in this case.

14 I mean, do you know what facts Mr. Rose is referring
15 to, Mr. Pearson?

16 MR. PEARSON: Well, your Honor, I hesitate to hazard a
17 guess as to which parts of the depositions Mr. Rose is talking
18 about.

19 THE COURT: I'm not sure if you spoke before this.

20 MR. PEARSON: Not in detail, your Honor. However, I
21 know that at the depositions, for instance, Mr. Rose might be
22 talking about information -- testimony that concerned the
23 purported interview that plaintiff had, which witnesses said
24 actually was more of a meet-and-greet introduction; discussing
25 whether or not Saks owned the registers that were at the

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1 cosmetics counter, you know, and the substance of some of the
2 meetings that might have happened between Saks' managers, who
3 walked the floor occasionally, as it turns out not necessarily
4 constantly, and some of the vendors in terms of just general
5 ideas regarding, OK, this is our store, here's how to conduct
6 oneself, or here are our general ground rules.

7 I mean, all of that appears in the complaint already,
8 the amended complaint at least and I believe it was even in the
9 original complaint. So there is really nothing new here.
10 Certainly, I haven't heard anything new this morning that would
11 justify a further supplementation of the papers, which, of
12 course, the defendants will require or would request an
13 opportunity to respond to as well.

14 THE COURT: No, I would give you that. I guess I am
15 agreeing with you, it is not clear to me what the additional
16 information from discovery is going to add to the motion that
17 we've got. It seems to me relevant to a different motion,
18 which is a motion to amend.

19 So if you want to make that motion, I think you should
20 do it in the usual way for me, which is a premotion letter that
21 lays out the new facts and what your amended complaint would
22 look like. In fact, you might even want to attach an amended
23 complaint that incorporates this new information that alters
24 the analysis. But if it is really just sort of more of what's
25 already in the complaint and you don't think it is necessary,

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1 then I'm not sure why I need to look under the hood because I'm
2 really just focused on what's in the pleadings, right, for this
3 motion?

4 MR. ROSE: Yes, your Honor. The facts that I would
5 have included relate more to the ownership of the items which
6 were then sold, which goes to the heart of whether there is an
7 employment relationship, whose goods they are selling and where
8 that money directly goes. It is a major part of the
9 analysis --

10 THE COURT: Right. But, I mean, this is not a motion
11 for summary judgment.

12 MR. ROSE: I understand.

13 THE COURT: This is a motion to dismiss the complaint
14 for failure to allege sufficient facts, right?

15 MR. ROSE: Yes.

16 THE COURT: So if the facts are not in the complaint,
17 then I am not going to spend a lot of time on it. If you are
18 telling me you would like to add those facts to the complaint,
19 then you should ask. But otherwise I'm just going to stay
20 focused on what's in the complaint, right?

21 MR. ROSE: Yes, your Honor. But I do understand that,
22 I believe, under a 12(b)(6) motion, you will also be allowed to
23 consider an affidavit that would be submitted that could be
24 also included in the pleadings.

25 I am attempting not to go through additional motion

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1 practice, which if you granted the motion to amend then there
2 would be a new motion to dismiss which then we would have to
3 rebrief, and I was attempting to cut out the two additional
4 motions by just submitting that additional information. If
5 your Honor doesn't want to do that, that is fine. We can go
6 forward under the present motion.

7 THE COURT: I haven't really given it any thought. I
8 just want to make clear what it is you are proposing. You are
9 proposing an affidavit?

10 MR. ROSE: Yes.

11 THE COURT: Was that clear to you, Mr. Pearson?

12 MR. PEARSON: I believe I understand where the
13 plaintiff is trying to go, trying to avoid another entire
14 motion. That's what we are trying to avoid as well, frankly.

15 If the plaintiff was permitted to file an affidavit,
16 of course that would still change the basis and the arguments
17 under the motion, at least potentially.

18 THE COURT: I think that is the goal. It is, in
19 essence, to get the benefit of an amended pleading.

20 (Pause)

21 The affidavit would be pursuant to what rule,
22 Mr. Rose?

23 MR. ROSE: I believe under 12(b)(6) and the
24 interpretation, the Court would be permitted to review an
25 affidavit submitted in opposition to a motion to dismiss. I'm

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1 not sure of the specific section.

2 THE COURT: Under Section 12(d) just says, "If on a
3 motion under 12(b)(6) matters outside the pleadings are
4 presented to and not excluded by the court, the motion must be
5 treated as one for summary judgment."

6 So it seems to me that is the effect of broadening
7 this.

8 So, you know, I hadn't looked at the authority that
9 you are talking about that suggests that I can allow a party to
10 submit an affidavit that effectively amends the complaint but
11 still keeps this as a 12(b)(6) analysis, as opposed to a Rule
12 56 analysis. I think if you want do that, you are better off
13 sending me a short letter that lays out the authority. It may
14 all be there. You may know this better than I do; it wouldn't
15 be the first time, I'm sure. So do that.

16 But we will have oral argument on the 30th of April,
17 which will be here before you know it, I think, but perhaps
18 longer than what you wanted. If you think you want to
19 supplement the pleadings in some way or supplement the record
20 in a way that's relevant to the motion, you know, get me
21 something probably by the end of this month, anyway, the next
22 couple of weeks. OK?

23 Then, Mr. Pearson, you can respond to whatever letter
24 Mr. Rose submits. OK?

25 MR. PEARSON: Yes, your Honor.

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1 THE COURT: All right. Well, that is what I had on my
2 agenda. Anything else that you folks wanted to cover today?

3 MR. METIS: Yes, your Honor. Are we going to get a
4 date when we have to make letters for a summary judgment
5 motion?

6 THE COURT: Yes. What we will do is I think once I
7 resolve the motion to dismiss, then we'll set -- we'll rejigger
8 the discovery dates. At that point I assume I'll set a new
9 post discovery conference date and a new date for premotion
10 letters on any motions. OK?

11 You think there are likely to be motions for summary
12 judgment?

13 MR. METIS: Yes. We will want to make a motion for
14 summary judgment.

15 THE COURT: OK.

16 MR. METIS: And we can continue with discovery up
17 until --

18 THE COURT: Yes, you folks should continue with
19 discovery. The only wildcard is what you can't get from Saks
20 as a third party that needs to wait for the resolution of the
21 motion. So anything that you would be getting from Saks as a
22 third party, I think you might as well be doing that. But if
23 it is inefficient because the deposition will be significantly
24 different depending on whether or not Saks is a party, then I
25 guess we should wait. OK?

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1 So I will defer to you on that. I think you folks
2 probably know your case better than I do, but let's use the
3 time productively so that once the motion to dismiss is
4 resolved we can move as quickly as possible with the balance of
5 discovery. OK?

6 MR. METIS: Thank you.

7 THE COURT: Great. Thank you all. Have a good day.

8 MR. ROSE: Thank you, your Honor.

9 THE COURT: If you need a copy of the transcript, you
10 can take that up with the court reporter. You can do that now.
11 I have a trial starting but I think we've got a few minutes.

12 OK. Thanks.

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